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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1366

ROBERT AND SANDRA SCHAEFER, ET AL.,
Petitioners,

vs.

FIRST NATIONAL BANK OF LINCOLNWOOD, ET AL.,
Respondents.

RESPONSIVE BRIEF OF RESPONDENTS THE AMERICAN STOCK EXCHANGE, INC., JOHN RISSETTO, AL VERNIERI, EDWARD CROOKS AND FRANK ALTER TO PETITION FOR A WRIT OF CERTIORARI.

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ARGUMENT.

I.

NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE WRIT ARE SET FORTH IN THE PETITION.

The Petition is plainly insubstantial. It fails to demonstrate that there are any "special or important" reasons for granting the Writ, within the meaning of Rule 19. Indeed, after carefully reading the Petition, respondents are not sure what it is about this case that petitioners consider important enough to justify seeking a Writ of Certiorari. Certainly, repeated state-

ments that antitrust enforcement is important given the "economic climate of our times" do not satisfy the requirements of Rule 19 (See Petition, pp. 4, 9).

The Petition makes vague allegations that the Seventh Circuit's decision is inconsistent with this Court's decision in *U. S.* v. *Patten*, 226 U. S 525 (1912), and "other circuit court decisions in the same general area of resolving limited jurisdiction of antitrust laws in certain areas that narrowly overlap with securities laws." (Petition, p. 12). These hints that the dismissal of the antitrust count was inconsistent with other decisions are neither true nor precise.

The Court of Appeals Opinion did not even mention the *Patten* case, though the Petition states that the Seventh Circuit "misinterpreted, misconstrued and misapplied" that decision (Petition, p. 10). Furthermore, *Patten* did not involve the manipulation of the price of stock. Rather, it involved the running of a corner on the price of cotton, a *commodity*, by competitors on the New York Cotton Exchange. The effect was to artificially raise the price of cotton, enable the conspirators to obtain control of available supply and "hamper users and consumers in satisfying their needs" 226 U. S. at 542. No such considerations are present here.

The Court of Appeals correctly held that the antitrust laws have been held applicable to other regulated industries only in situations where there was no alternative relief available to the aggrieved party (Petition, p. 27a). E.g. *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963); cf. *Ricci* v. *Chicago Mercantile Exchange* 409 U. S. 289 (1973). In such situations, implied repeal of the antitrust laws is severely proscribed, unless it is found that the challenged practice is necessary to the functioning of the regulatory statute which is asserted to pre-empt the antitrust laws.

Here, in contrast to such situations, a complete statutory scheme of relief under the Securities Act of 1933 and the

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Securities Exchange Act of 1934, is specifically directed to the manipulation of stock prices, and was availed of by petitioners in Count I of their Complaint. Indeed, as to respondents Rodman and Renshaw, Myers, Gorman and Fogelson, the Court of Appeals reversed their dismissal under Count I, and remanded this case for trial as to those respondents on the alleged securities law violations (Petition, p. 24a).

In addition to the reasons stated in its Opinion, the Court of Appeals also adopted all of the reasons set forth in the District Court opinion for dismissing the antitrust count (Appendix, p. 28a; 326 F. Supp. 1186, 1190-92). The District Court Opinion reviewed the legislative history of the securities laws and concluded that they provided a complete remedy for manipulation of stock prices. Petitioners have not attempted to argue with the reasoning expressed therein.

II.

EVEN IF A REMEDY EXISTED UNDER THE ANTITRUST LAWS, OTHER GROUNDS ASSERTED TO THE COURT OF APPEALS BUT NOT RULED UPON BY IT, WOULD BAR AN ANTITRUST COMPLAINT AGAINST THE EXCHANGE AND SPECIALIST RESPONDENTS.

In addition, no purpose would be served by granting the Writ since two other independent grounds for barring an action against the Exchange and specialist respondents exist. These grounds were asserted in the Court of Appeals by the Exchange and the specialists in support of dismissing the antitrust count against them. The Court of Appeals did not find it necessary to reach either point in light of its holding that no remedy existed under the Sherman Act.

First, the antitrust count is barred as to the Exchange and the specialists by the four year statute of limitations contained in Section 4B of the Clayton Act. 15 U. S. C. § 15b. At the latest, the alleged conspiracy ended August 23, 1967 (Peti-

tion, p. 8a). The Amended Complaint naming the Exchange and specialists as additional defendants, was filed on October 18, 1972, over five years later (Petition, p. 9a). In light of the Court of Appeals holding that the statute of limitations was not tolled as to the Exchange and specialists (Petition, pp. 24a-26a), a finding not challenged by this Petition, the statute of limitations would bar the antitrust claims against the Exchange and specialists.

Second, even if a remedy existed under the antitrust laws, the allegations against the Exchange and specialists do not charge that they were part of the manipulation conspiracy, but only that they failed to prevent it. In essence, they are charged with violating the law by neglecting a duty to discover the conspiracy. Section 1 of the Sherman Act is not violated by inaction. A conspirator must actually have knowledge of the common plan, and commit some act in furtherance of it. As stated by the Seventh Circuit in *United States* v. *Standard Oil Company*, 316 F. 2d 884, 890 (7th Cir. 1963):

> "The substantive law of trade conspiracies requires some consciousness of commitment to a common scheme. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., et al., 346 U.S. 537, 540-541 74 S. Ct. 257, 98 L. Ed. 273. It has been stated there is no such thing as an 'unwitting conspirator.' United States v. National Malleable & Steel Castings Co., N. D. Ohio, 1957 C C H Trade Cases Par. 68890, at page 73601. Unless the individuals involved understood from something that was said or done that they were, in fact, committed to raise prices, there was no violation of the Sherman Act."

The mere allegation that the Exchange and specialists failed to properly supervise trading in Hercules-Galion stock does not meet the standards of knowledge and action required to state a cause of action for price fixing.

CONCLUSION.

For all of the foregoing reasons, respondents respectfully pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States submits this Memorandum as *amicus curiae* in response to the Court's invitation of June 23, 1975.

STATEMENT

In August 1967, a federal grand jury charged several individuals with having manipulated the price of the stock of Hercules-Galion Products, Inc. ("Hercules") between 1965 and 1967, in violation of the federal securities laws, including Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a) ("Securities Act"), and Section 9(a)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(a)(2) ("Exchange Act"), and in violation of the federal mail and wire

fraud statutes, 18 U.S.C. 1341 and 1343 (Pet. App. 6a–8a).[1]

Petitioners, individually and on behalf of a class of persons who had purchased Hercules stock between 1965 and 1967, instituted this civil action against the criminal defendants, certain brokerage firms at which various of the criminal defendants were employed, certain officers of Hercules, and the American Stock Exchange ("Amex") and certain of its specialists. The complaint alleged substantially the same events as were alleged in the indictment and charged the criminal defendants with violating Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Sections 9(a)(2) and 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(a)(2) and 78j(b); and Section 1 of the Sherman Act, 15 U.S.C. 1; and with common law fraud (Pet. App. 7a–8a). The other defendants were charged with failure to take appropriate measures to prevent the manipulation.[2]

The district court dismissed petitioner's Sherman Act claim on the grounds that the antitrust remedy was superseded by the more specific remedies of the federal securities laws; that such manipulations con-

[1] Most of those indicted were convicted. See, *United States* v. *Projansky*, 465 F. 2d 123 (C.A. 2).

[2] The heart of the manipulation involved an alleged scheme by which the criminal defendants and others regularly purchased from each other large blocks of Hercules stock on the Amex at prearranged prices, creating public interest in the stock which enabled them to sell it at a profit. As a result of this activity, the price of the stock increased from $6 to more than $14 per share. The same conduct was alleged as the basis for all counts of the complaint.

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stituted fraud rather than restraint of trade at common law and consequently were not covered by the antitrust laws; and that by enacting the Securities Exchange Act Congress had intended to limit recovery to actual damages rather than treble damages under the antitrust laws (Resp. App. A1–A12). Subsequently, the district court dismissed the claims against several of the defendants based upon the federal securities laws and common law fraud on the ground that those claims were barred by the three-year limitations period of the Illinois Securities Act. The district court reaffirmed the dismissal of the antitrust claims (Pet. App. 2a–5a).

The court of appeals affirmed the dismissal of the antitrust claims (Pet. App. 26a–28a), reasoning that "[p]rivate parties may only bring antitrust claims against an exchange or its members when there is no other vehicle for review," and that the plaintiffs had such a vehicle under the securities acts (Pet. App. 27a); and that the manipulation scheme underlying the plaintiffs' claim "was envisioned to be fully dealt with under the securities acts" (Pet. App. 28a). The court reversed the district court's dismissal of the federal securities law claims on the basis of the statute of limitations, holding that the limitation period had been tolled, with respect to certain of the defendants, until the fraud was discovered at the time the criminal indictment was returned (Pet. App. 15a–24a).[3] How-

[3] Rodman & Renshaw, a defendant securities broker-dealer, has petitioned this Court for a writ of certiorari to review this portion of the court of appeals' ruling. *Rodman & Renshaw* v.

ever, the court affirmed the dismissal of the Amex and its specialists, finding no tolling of the period (Pet. App. 24a–26a).

DISCUSSION

1. In holding that the existence of a damage remedy under the securities laws preempts private remedies under the antitrust laws, the court of appeals acted contrary to a long line of decisions by this Court which hold that repeal of the antitrust laws by implication is not appropriate in the absence of a "plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348, 350–351, and cases cited therein. Repeal of traditional antitrust remedies is implied only where "necessary to make [another regulatory scheme] work." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357.

Repeal of private antitrust remedies is not necessary to effectuate the securities laws' prohibition of stock manipulation schemes. Here, unlike the situations in *Gordon* v. *New York Stock Exchange, Inc.*, No. 74–304, decided June 26, 1975, and *United States* v. *National Association of Securities Dealers, Inc.*, No. 73–1701, decided June 26, 1975, maintenance of the antitrust action would create no danger that participants in the securities industry might be subjected to inconsistent standards, since the conduct at issue was alleged to violate both the Sherman Act and the

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Schaefer, No. 74–1407. A memorandum setting forth the views of the Securities and Exchange Commission on that case has been filed with the Court.

securities laws.[4] Indeed, in these circumstances the antitrust claim would supplement the enforcement of the securities laws.

There is no indication that, by creating a specific remedy for stock manipulations in Sections 9(a)(2) and 28(a) of the Securities and Exchange Act, Congress thereby intended to repeal private antitrust damage remedies that alternatively might be available to a party victimized by such a manipulation. This Court has repeatedly declined to construe special industry regulations that provide damage remedies as an implied repeal of the antitrust laws. See *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218; *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Union No. 100*, No. 73-1256, decided June 2, 1975.

Nor, contrary to the court of appeals' ruling, does the limitation of recovery to actual damages under the securities laws indicate a congressional intent to preclude an alternative remedy, such as that available under the antitrust laws, that provides recovery in excess of actual damages. It is well established, for example, that where a claim under the securities laws is joined with a claim based upon common-law fraud or a state blue-sky law, the limitation upon recovery of damages under the federal securities laws does not preclude

[4] In *Gordon* and *National Association of Securities Dealers* this Court held that the antitrust laws were not applicable to practices which had either been approved by the Securities and Exchange Commission or were subject to the review of the Commission and had not been disapproved by that body.